Petition

81-371

Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO:_____

CHARLES J. CARNEY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JAMES C. HERNDON
MARK J. SKAKUN III
P. O. Box 1500
One Cascade Plaza
Akron, Ohio 44309
(216) 376-5300

QUESTIONS PRESENTED

I. Whether a pretrial evidentiary ruling denying privilege under the Speech or Debate Clause to documents admittedly intended by the Government to be introduced into evidence at trial is a final, appealable order within the meaning of 28 U.S.C. Section 1291?

II. Whether a pretrial order denying a Congressional defendant access to the grand jury minutes, after a showing that substantial amounts of evidence protected by the Speech or Debate Clause were presented to the grand jury is a final, appealable order within the meaning of 28 U.S.C. Section 1291?

III. Whether, as an incidental exercise of its power to review Speech or Debate

Clause issues properly before it, the Court of Appeals has jurisdiction to review related Speech or Debate Clause rulings of the District Court?

IV. Whether a facially valid indictment is subject to dismissal for demonstrated violations of the Speech or Debate Clause privilege during the grand jury proceedings?

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LIST OF ALL PARTIES

All parties to the proceeding sought to be reviewed appear in the caption of the case in this Court.

OPINIONS BELOW

Neither the Court of Appeals for the District of Columbia Circuit nor the District Court for the District of Columbia rendered opinions. However, the judgment of the Court of Appeals appears in the Appendix hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 29, 1981. A timely petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution Article 1, Section 6, Clause 1:

The Senators and Representatives shall receive a Compensation for their services to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and then going to and returning from the same; and for any Speech or Debate, in either House, they shall not be questioned in any other Place.

2. 18 U.S.C. §201(g):

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as

provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

The Petitioner, Charles J. Carney, a former member of the U. S. House of Representatives, was indicted by a grand jury in the District of Columbia on November 12, 1980. The indictment charged one count of accepting a gratuity as a public official or former public official in violation of 18 U.S.C. §201(g). The charge arose out of Petitioner's acceptance of a gasoline credit card from an oil jobber in the Youngstown, Ohio area. Petitioner received this gasoline credit card prior to his election to Congress in 1970 and continued to hold it long after his defeat for reelection in 1978. This matter is not related to the Abscam cases.

In its response to Petitioner's motion for a bill of particulars and in other pleadings filed with the District Court, the Government indicated its intention to intro-

duce at trial certain documents and testimony as evidence of the "official acts" alleged in the indictment (App. at 44-46). These documents and testimony relate to, among other things, the drafting of a proposed amendment to the Petroleum Marketing Practices Act and a copy of that amendment which was introduced by Petitioner in the House of Representatives (App. at 44-45). Evidence available to Petitioner and filed with the District Court demonstrated that the grand jury received and considered those documents and testimony, as well as substantial amounts of other evidence protected by the Speech or Debate Clause, that were materially related to the indictment (See, e.g., App. at 21ff). Petitioner has consistently maintained that such documents and testimony are protected by the Speech or Debate Clause of the United States Constitution. Petitioner moved the District Court to exclude

such documents from evidence at trial. Petitioner also moved the District Court for access to the grand jury minutes to enable Petitioner to prepare a motion to dismiss the indictment based on violations of the Speech or Debate Clause occurring during the grand jury proceedings.

As the trial date approached without a ruling by the District Court on Petitioner's motion for access to the grand jury minutes, he filed a motion to dismiss the indictment on grounds of violations of the Speech or Debate Clause. That motion was filed without the benefit of access to the grand jury minutes. On the day scheduled for trial, the District Court denied Petitioner's motion for access to the grand jury minutes and, with exceptions not pertinent herein, declined to exclude from admission at trial the documents which Petitioner claimed were privileged under the Speech or Debate

Clause. Without disclosing any rationale for its determination, the District Court then denied Petitioner's motion to dismiss the indictment. Petitioner appealed the District Court's order denying all of three of Defendant's motions.

The Court of Appeals, without opinion, affirmed the District Court's denial of the motion to dismiss the indictment and found that it had no jurisdiction to review the denial of the remaining two motions.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why this petition should be granted: (1) Both the jurisdictional and substantive rulings of the Court of Appeals are in conflict with the decisions of other federal courts of appeals on the same matters; (2) This petition raises important questions of constitutional law which have not been, but should be, settled by this Court; and (3) The decision of the Court of Appeals so undermines a prior decision of this Court that the constitutional guarantees afforded by the Speech or Debate Clause are endangered.

I. THE DETERMINATION OF THE COURT OF APPEALS THAT IT HAD NO JURISDICTION TO REVIEW THE DISTRICT COURT'S PRETRIAL SPEECH AND DEBATE CLAUSE RULINGS IS CONTRARY TO THE HOLDINGS OF OTHER CIRCUITS AND THE PRINCIPLES ESTABLISHED BY THIS COURT.

Questions Presented Numbers I, II, and III relate to an appellate court's power to

review Speech or Debate Clause claims. In Helstoski v. Meanor, 442 U.S. 500 (1979), this Court held that there was a right of pretrial appellate review of the denial of Congressman Helstoski's motion to dismiss the indictment based on violations of the Speech or Debate Clause on the grounds that important policies underlying the Speech or Debate Clause justified the existence of pretrial appellate review.

Consistent with the policies recognized and enunciated in Meanor, courts of appeals have recognized appellate jurisdiction over Speech or Debate Clause issues extending beyond a motion to dismiss. For example, in United States v. Williams, 644 F. 2d 950 (2d Cir. 1981), the court reviewed the decision of a district court denying in part Senator William's motion for release of the grand jury minutes. See also United States v. Myers, 635 F. 2d 932 (2d Cir. 1980),

cert. denied, 101 S. Ct. 364 (1980); Cf. Benford v. American Broadcasting Companies, Inc., No. 81-1200 (4th Cir. June 17, 1981) (reprinted in App. at A48).

In the instant case, the denial of appellate review of Petitioner's motion for access to the grand jury minutes is directly in conflict with Williams. Further, while Williams and Myers do not deal with appellate jurisdiction over pretrial evidentiary rulings, since in those cases the Government did not identify protected documents as intended for use at trial, the denial of appellate review of Petitoner's motion to exclude documents as evidence at trial conflicts with the principles and rationale enunciated in Williams and in Myers.

Whether the policies that underlie this Court's decision in Helstoski v. Meanor, 442 U.S. 500 (1979), require pretrial appellate review of rulings denying a Speech or Debate

privilege to evidence to be admitted at trial is an important issue of federal constitutional law which has not been, but should be, settled by this Court. As this Court has previously stated, the purpose of the Speech or Debate Clause is "to preserve our constitutional structure of separate, co-equal, and independent branches of government." United States v. Helstoski, 442 U.S. 477, 471 (1979). This purpose can only be served where the protections of the Clause are known by legislators and prosecutors to be enforceable to prevent being "questioned" about legislative acts in any place other than Congress. "The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before any trial has occurred." United States v. Myers, 635

F. 2d at 936. When it is recalled that the circuit which has denied appellate jurisdiction to review the Petitioner's Speech or Debate Clause claims is the circuit within which Congress sits, the substantiality of the issue is underscored.

The denial of appellate jurisdiction over Petitioner's motion to exclude documents also undermines the decision of this Court in United States v. Helstoski, 442 U.S. 477 (1979). In that case, this Court concluded that the Speech or Debate Clause precludes introduction into evidence at trial of documentary and testimonial evidence protected by the Speech or Debate Clause. The constitutional privilege mandated by that decision (which, it should be noted was an interlocutory appeal of a district court's pretrial order excluding certain evidence from admission at trial) will be lost if this Petitioner is denied

pretrial appellate review to test the evidentiary determinations of the District Court.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE STANDARDS FOR DISMISSAL OF AN INDICTMENT ON SPEECH OR DEBATE CLAUSE GROUNDS.

Question Presented Number IV deals with the ruling of the Court of Appeals that dismissal of the indictment was not appropriate even if violations of Petitioner's privilege under the Speech or Debate Clause occurred during the grand jury process. That court concluded that dismissal on Speech or Debate Clause grounds is available only for those parts of an indictment which are facially invalid.

The Court of Appeals itself noted the conflict between its decision and that of the Court of Appeals for the Third Circuit in United States v. Helstoski, 635 F. 2d 200 (3d Cir. 1980). In that case, the Third

Circuit found a substantive right of dismissal of the entire indictment, including counts unrelated to activities protected by the Speech or Debate Clause, on the ground that violations of Congressman Helstoski's Speech or Debate Clause privilege occurred during the grand jury investigation.

Although the Court of Appeals cited United States v. Myers, 635 F. 2d 932, cert. denied 101 S. Ct. 364 (1980), in support of its position, Myers merely establishes a further conflict among the circuits. In Myers, the Court denied dismissal even though some Speech or Debate protected evidence may have been introduced to the grand jury. However, that Court observed:

> We need not consider whether an indictment might be subject to a motion to dismiss in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand

> jury had sufficient competent evidence to establish probable cause. In this case Judge Mishler noted at the argument on Defendant's motion to dismiss, that extensive tapes and recordings were before the grand jury, referring to episodes in which money was received allegedly in return for promises. 635 F. 2d at 941, n. 10.

It appears in Myers, an Abscam case, that the protected evidence involved, if any, was de minimus. Further, the opinion does not demonstrate the relevance of any such evidence to the indictment. That is certainly not the situation in this case: Here there is evidence of violations of Petitioner's Speech or Debate Clause privilege during the grand jury proceedings that are materially related to the indictment returned. Since Petitioner has not been granted access to the minutes, greater particularization is not possible at this time.1/

1/ Petitioner's inability to give specific examples of the evidence presented to the grand jury that violated his Speech or Debate Clause privilege illustrates the extent to which Petitioner's ability to mount an effective defense is undermined by the District Court's denial of his motion for access to the grand jury minutes and the Court of Appeals refusal to review this denial. Neither party disputes that under Helstoski v. Meanor, 442 U.S. 500 (1979), the District Court's denial of the motion to dismiss the indictment is an appealable interlocutory order. But implicit in the right to appeal this order is the right to a meaningful and effective review of the claims rejected by the court below. By denying Petitioner access to the grand jury minutes and thus the opportunity to discover the extent to which privileged evidence tainted the grand jury proceedings (to which Petitioner himself was never called to testify), the District Court has denied Petitioner meaningful review of the order from which this appeal has been properly taken. Contrary to the determination of the Court of Appeals, an appellate court has jurisdiction to review the propriety of denying access to grand jury minutes incidental to its power to review the Speech or Debate Clause issues properly before it pursuant to this appeal of the denial of the motion to dismiss the indictment. See: Benford v. American Broadcasting Companies, Inc. No. 81-1209 (4th Cir. June 17, 1981) (reprinted in App. at A48).

Although the Helstoski and Myers courts differ as to the extent of protected evidence that must be considered by the grand jury in order to warrant dismissal of the indictment, both courts implicitly agree that the nature of the evidence presented to and considered by the grand jury is what determines whether the indictment should stand. In refusing to dismiss the indictment in this case, however, the Court of Appeals has held that the dispositive question is not the nature of the evidence before the grand jury but whether the indictment is "facially invalid" on Speech or Debate Clause grounds (App. at A4).

Whether the instant indictment is "facially invalid" is not a proper consideration in determining whether the indictment should be dismissed. First, the Government's response to Petitioner's request for a bill of particulars has

clearly indicated that the scope of the indictment and the proof to be presented at trial extends to activities indisputably protected by the Speech or Debate Clause. See, e.g., App. at 44-46. One example of such privileged evidence is evidence of the events surrounding the preparation of an amendment to the Petroleum Marketing Practices Act. This amendment was actually introduced by Petitioner in the House of Representatives. The amendment itself has even been adjudicated by the District Court to be admissible. The Court of Appeals declined to review this determination.

Second, a "facial invalidity" standard injects into the law the very opportunity for intimidation by the Executive Branch which the Speech or Debate Clause is designed to preclude. Under this standard, the Government may violate the Clause with

impunity so long as it is careful to return a facially valid indictment.

Finally, a rule requiring facially invalidity for dismissal of an indictment on Speech or Debate Clause grounds is inconsistent with the purposes of the Speech or Debate Clause. These purposes, as the Third Circuit in United States v. Helstoski, 635 F. 2d 200 (3d. Cir. 1980), recognized, are as equally applicable to those counts of an indictment which make no mention of activities protected by the Speech or Debate Clause (and are thus "facially valid") as to those counts which do. It therefore appears that the decisions of the Third, Second, and District of Columbia Circuits are all in conflict, and the decision of the court of appeals to which this petition is directed is the most restrictive of the three in its interpretation of the scope of the Speech or Debate Clause privilege.2/

2/ If the decision of the Court of Appeals below is correct and the validity of the indictment is to be judged on its face, the privileged nature of the evidence on which the indictment is based is irrelevant. If, however, the decisions of the Second and Third Circuit are correct, then there exists a substantial question for decision by this Court as to whether meaningful appellate review of the denial of Petitioner's motion to dismiss the indictment requires a determination of whether a defendant is entitled to discover whether the evidence submitted to and considered by the grand jury is privileged under the Speech or Debate Clause.

This Court has never expressly decided under what circumstances a trial court must dismiss an indictment that arises out of activities protected by the Speech or Debate Clause. The question is of central importance to the operation of the separate but equal branches of the federal government, and its significance is redoubled when one recalls that the circuit that has held that the Speech or Debate Clause affords no right to dismiss an indictment that is returned despite substantial violations of the Speech or Debate Clause privilege in the grand jury proceedings is the circuit in which Congress itself sits. Such a holding enables the Executive Branch, if it so chooses, to select a favorable forum for questionable enforcement activities, thereby endangering the values sought to be protected by the Speech or Debate Clause.

For all of these reasons, a writ of certiorari should issue to review the Judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JAMES C. HERNDON
MARK J. SKAKUN III
Counsel for the
Petitioner

August _____, 1981

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

[No Opinion]

No. 81-1378 September Term, 1980

Criminal No. 80-00502

UNITED STATES OF AMERICA

v.

CHARLES J. CARNEY, Appellant

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, McGOWAN, and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been accorded full

consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

Charles J. Carney appeals from three different rulings of the District Court. In our view, the ruling of the District Court denying appellant's pretrial motion to exclude from use at trial certain evidence purportedly covered by the Speech or Debate Clause is not a "final decision" for purposes of 28 U.S.C. §1291 (1976), and it is therefore unappealable. See Cogen v. United States, 278 U.S. 221 (1929); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); United States v. Mock, 604 F.2d 336, 340 (5th Cir. 1979). Similarly, the District Court's ruling denying appellant's motion to permit inspection of the grand jury minutes is unappealable at this juncture. See In re Special March 1974 Grand Jury, 541 F.2d 166 (7th Cir. 1976) cert. denied, 430 U.S. 929 (1977); 9

J. Moore, Federal Practice ¶110.13 [11] at 193 (2d ed. 1980). The third ruling of the District Court, denying Carney's motion to dismiss the grand jury indictment on Speech or Debate Clause grounds, is immediately appealable. See Helstoski v. Meanor, 442 U.S. 500 (1979). We hold, however, that the District Court's denial of this motion was proper. Even if it is true, as appellant claims, that some of the evidence presented to the grand jury violated the Speech or Debate Clause, dismissal of the grand jury indictment was not appropriate. See United States v. Johnson, 383 U.S. 169 (1966); United States v. Myers, 635 F.2d 932, 941 (2d Cir.), cert. denied, _____ U.S. _____ 49, U.S. L. Week 3332 (November 3, 1980); United States v. Johnson, 419 F 2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); cf. United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States,

350 U.S. 359 (1956). But see United States v. Helstoski, 635 F.2d 200 (3d Cir. 1980). Rather we think that only those parts of an indictment which are facially invalid should be dismissed on Speech or Debate Clause grounds. See, e.g., United States v. Johnson, supra, 383 U.S. 169. In the instant case, however, appellant does not challenge the facial validity of the one-count indictment.

On consideration of the foregoing, it is

ORDERED and ADJUDGED by this court that the portions of this appeal which challenge the District Court's rulings on the motion to exclude certain evidence from use at appellant's trial and the motion to permit inspection of grand jury minutes, being unappealable at this juncture, are hereby dismissed. It is

FURTHER ORDERED and ADJUDGED by this court that the ruling of the District Court which denied appellant's motion to dismiss the grand jury indictment is hereby affirmed.

Per Curiam

For the Court

/s/George A. Fisher
George A. Fisher
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA NOV. 12, 1980

v. NO. 80-00502

CHARLES J. CARNEY

The Grand Jury charges that:

From on or about November 3, 1970, and continuing until on or about January 3, 1979, in the District of Columbia, and elsewhere, CHARLES J. CARNEY, a United States Congressman from on or about November 3, 1970, to on or about January 3, 1979, unlawfully and knowingly did, directly and indirectly, ask, demand, exact, solicit, seek, accept, receive and agree to receive a thing of value, that is, AMOCO gasoline credit cards, the right to use such credit cards, and the use of such credit cards, the charges on which were to be paid for and

were paid for by the Lyden Oil Company, for and because of official acts performed and to be performed by CHARLES J. CARNEY, otherwise than as provided by law for the proper discharge of his official duty as a United States Congressman in violation of Section 201(g), Title 18, United States Code.

A TRUE BILL:

_____

FOREPERSON

Signed by Gerald E. McDowell
Chief, Public Integrity Section
United States Department of Justice

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CASE NO. 80-00502

UNITED STATES OF AMERICA,

Plaintiff

vs.

CHARLES J. CARNEY,

Defendant

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO INSPECT GRAND JURY MINUTES

STATE OF OHIO)
) SS
COUNTY OF SUMMIT)

CHARLES J. CARNEY, being first duly sworn, states as follows:

1. I am the Defendant in the above-captioned matter, and I make this Affidavit in Support of the Motion to Inspect the Minutes of the Grand Jury that returned the Indictment in the above-captioned matter.

2. Before the Indictment herein was returned, agents of the Federal Bureau of Investigation, or persons who identified

themselves as such agents, without my prior consent or knowledge, examined the records, papers, correspondence, and other documents (hereinafter "documents") drafted or assembled by me or at my direction in my capacity as a member of the House of Representatives from 1970 through 1978.

3. The persons referred to in Paragraph 2 above copied portions of said documents and also removed from my files various documents without my permission or knowledge.

4. The documents examined by the persons referred to in Paragraph 2 above included materials revealing (1) my motivations for the introduction of legislation, my voting decisions on proposed legislation and my motivations for performing various other legislative acts; (2) the procedures by which I presented proposed legislation to the House of Representatives; (3) my office

procedures for handling requests by my constituency that I introduce certain legislation or that I vote for or against certain proposed legislation; (4) correspondence and files concerning proposed legislation and amendments to proposed legislation; (5) copies of proposed legislation itself; (6) correspondence, memoranda and other written material concerning my speeches on the floor of the House or in Committee and copies of these speeches themselves.

5. One or more of my legislative aids [sic] have testified before the Grand Jury. These aides have personal knowledge of my motivations in proposing legislation and voting on various bills in Committee or on the floor of the House, as well as my motivations for various other legislative acts performed during the course of my terms as a Member of the House of Representatives. These aides have also had access to files

which contained evidence of my legislative acts and the motivations for such legislative acts.

6. The facts stated in Paragraphs 2 through 5 above lead me to believe that the Grand Jury may have considered evidence of my legislative acts and the motivations for such acts in violation of the Speech and Debate Clause of Article I, Section 6 of the United States Constitution.

Dated this _____ day of November, 1980.

/s/Charles J. Carney
CHARLES J. CARNEY

SWORN to and subscribed before me this 21st day of November, 1980.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES	REPORT TO UNITED STATES DISTRICT COURT HOUSE Between 3d Street and John Marshall Place and on Constitution Avenue NW 3rd Floor Room # 23 Washington, D.C.
vs.	
JOHN DOE	

To: Gary L. Steib
Treasurer
Lyden Oil Company
739 Andrews Avenue
Youngstown, Ohio 44505

Bring with you the records described on the attached sheet.

You are hereby commanded to attend before the Grand Jury of said Court on Wednesday the 14th day of November, 1979, at 10:00 o'clock AM, to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

EXHIBIT

A12

WITNESS: The Honorable _____, Chief Judge of said Court, this 26th day of October, 1979

JAMES F. DAVEY, Clerk

By/s/Robert L. Line
Deputy Clerk

Andrew J. Reich
Attorney for Department of Justice

Gary L. Steib
Treasurer
Lyden Oil Company
739 Andrews Avenue
Youngstown, Ohio 44505

Concerning all AMOCO credit cards issued individually to Charles J. Carney, or jointly to Charles J. Carney with another individual or corporation, between January 1, 1968 and October 1, 1979, including but not limited to AMOCO credit card #456-832-425-78, bring with you all records of the Lyden Oil Company and/or the Lyden

Land Company and/or the Lyden Hauling Company, or any subsidiaries thereof, hereafter referred to as Lyden, et al., reflecting payments by said companies under such credit cards, including but not limited to, disbursement journals, credit card payment receipts, cancelled checks from said companies to Standard Oil of Indiana and/or AMOCO, AMOCO monthly billing statements, credit card applications and credit card purchase receipts. Also bring with you any other records of Lyden, et al, reflecting payments by said companies on behalf of expenses incurred by Charles J. Carney between January 1, 1968 and October 1, 1979. Also bring with you all correspondence, memorandums or other documents prepared between January 1, 1968 and October 1, 1979 1, 1968 and October 1, 1979 relating to communications between Lyden, et al., or any of its representatives, and Charles J.

Carney, and/or the House Committee on Interstate and Foreign Commerce, including but not limited to, all such documents relating to the "Petroleum Marketing Practices Act." Also bring with you all correspondence, memorandums or other documents prepared between January 1, 1975 and January 1, 1977 relating to communications between Lyden et al, or any of its representatives, and the National Oil Jobbers Council concerning the "Petroleum Marketing Practices Act."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) CRIMINAL
	) NO. 80-00502
vs.	)
	)
CHARLES J. CARNEY,	)
	)
Defendant.	)
	)
	)

AFFIDAVIT

After being first duly sworn, Affiant, ROBERT BASSMAN, states as follows:

1. That I am presently an attorney in Washington, D.C. in private practice. Previously, I served as an attorney for an organization located in Washington, D.C. known as the National Oil Jobbers Council (NOJC).

2. That in my capacity as an attorney for the NOJC I communicated with Tony DeStefano regarding legislation known as the Petroleum Marketing Practices Act. Mr.

DeStefano was a member of the staff of Congressman Charles J. Carney.

3. That I have reviewed a memorandum from "Bob" to "Tony" with two attached pages entitled "Amendment to H.R. 13000" and "Title 13-Business Credit and Assistance."

4. That to the best of my recollection the memorandum and amendment referred to in paragraph 3 above were authored by me and typed in the offices of the NOJC, including the heading to the document entitled "Amendment to H.R. 13000 Offered by Mr. Carney." After these two documents were typed, the original memorandum and a copy of the amendment were forwarded, along with a copy of the document entitled "Title 13-Business Credit and Assistance," to Mr. DeStefano.

5. That to the best of my recollection the name "Bob" referred to in the memorandum is a reference to myself, and the name "Tony"

is a reference to Mr. DeStefano.

6. That to the best of my recollection the documents referred to in paragraph were forwarded to Mr. DeStefano prior to the time that Mr. Carney offered the amendment to the Petroleum Marketing Practices Act that was proposed by the NOJC.

Signed by Robert Bassman
ROBERT BASSMAN

SWORN to and subscribed before me
this 30th day of January, 1981.

Nora M. Burns
Notary Public

My commission EXPIRES DEC. 14, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	CRIMINAL NO. 80-00502
vs.	
CHARLES J. CARNEY,	JUDGE: BRYANT
Defendant	AFFIDAVIT

After being first duly cautioned and sworn, Robert Bassman states:

1. That in 1976 I was counsel to the National Oil Jobbers Council;

2. That in that capacity, I cooperated with a member of Congressman Charles Carney's staff in the preparation of a proposed amendment to the Petroleum Marketing Practices Act during that year;

3. That such activity included the transmittal of information to Congressman Carney and his staff, which information was necessary for consideration of the amendment by Congressman Carney and by the

Interstate and Foreign Commerce Committee of the House of Representatives, and further such activity included suggestions for language in the amendment;

4. That the language of the amendment resulted from efforts of both Congressman Carney's legislative aide and myself;

5. That pursuant to subpoena, I testified before the grand ury [sic] regarding the foregoing.

Further affiant sayeth naught.

Signed by Robert Bassman
ROBERT BASSMAN

Sworn to and subscribed in my presence this 20th day of February, 1981.

Signed by Nora M. Burns
Notary Public

My commission EXPIRES
DEC. 14, 1981

IN THE

UNITED STATES DISTRICT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

VS.

CHARLES J. CARNEY,

DEFENDANT

CRIMINAL NO. 80-00502

AFFIDAVIT

After being first duly cautioned and sworn, affiant Robert Sullivan states as follows:

1. That at all times material herein I was Vice President of the National Oil Jobbers Council (NOJC);

2. That NOJC received a subpoena duces tecum from the Grand Jury, a copy of which is attached hereto as Exhibit A;

3. That in my official capacity I appeared before the Grand Jury pursuant to said subpoena;

4. That during my appearance before the Grand Jury, Attorney Andrew Reich requested that I produce the documents called for by said subpeona, which I did;

5. That true copies of said documents are attached hereto as Exhibits B, C, D & E;

Further affiant sayeth naught.

/s/Robert Sullivan
Robert Sullivan

Subscribed and sworn to before me
this 13th day of March, 1981

/s/Beverly Jean Leuri
Notary Public

My commission Expires 1/14/85

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES	REPORT TO UNITED STATES DISTRICT COURT HOUSE Between 3d Street and John Marshall Place and on Constitution Avenue NW ROOM 2124 Washington, D.C.
VS.	
JOHN DOE	

TO: Mr. Robert Sullivan, or
Other Custodian of the
Described Records
National Oil Jobbers Council
1707 H. Street, N.W.
Washington, D.C.

You are hereby commanded to attend before the Grand Jury of said Court on Friday the 30th day of May, 1980, at 10:00 o'clock A.M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney, and bring with you (see attached).

EXHIBIT A

WITNESS: The Honorable William Bryant, Chief Judge of said Court, this 27th day of May, 1980.

JAMES F. DAVEY, Clerk

By/s/Robert L. Line
Deputy Clerk

Andrew J. Reich, Attorney
U.S. Department of Justice
Criminal Div., 315-9th Street, N.W.
Washington, D.C. 20530
Attorney for United States

Attachment to the Subpoena of
May 27, 1980
National Oil Jobbers Council

Bring with you all minutes of the Board and Executive Committee of the National Oil Jobbers Council in 1976 pertaining to legislation known as the "Petroleum Marketing Practices Act," also known as "Dealers Day in Court," or any amendments thereto. Also bring with you all correspondence, memoranda or other documents prepared between January 1, 1976, and January 1, 1977, concerning communications between Robert Bassman, Douglas Mitchell and/or Ed Peskowitz and Charles J. Carney, former United States Congressman.

September 15, 1976

The Honorable Charles Carney
United States House of Representative
1714 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Carney:

On behalf of the more than 15,000 independent distributor of gasoline and heating oil represented by the National Oil Jobbers Council, I am writing to express our association's gratitude for your attempt yesterday morning to amend Dealer Day in Court legislation (H.R. 13000).

Unforunately, your proposal to exempt small businessmen from the bill's inequitable duty to renew obligations was rejected. Nonetheless, this effort underscores a deep awareness of the problems struggling independent distributors now face, and the assistance they will require if the most

competitive segment of the petroleum industry is to survive.

In the future, hopefully, similar efforts by champions of small businessmen, such as yourself, will meet with deeper understanding and a greater measure of success.

Sincerely,

Jack C. Pester,

DP:caj

NATIONAL OIL JOBBERS COUNCIL
1750 New York Avenue, N.W.
Suite 230
Washington, D.C. 20006
(202)331-1198

September 13, 1976

Congressman Charles J. Carney
Attention: Mr. Tony De Stefano
1714 Longworth House Office Building
Washington, D.C.

Dear Tony:

As the attached CFR excerpt shows SBA's Small Business Loan Standard is in fact $22 million dollars for petroleum products wholesalers. The letter of NOJC from SBA's Size Standard Division cites a survey stating that this figure would include 99.4% of all petroleum wholesalers. While I have no figures to directly contravene this, I have worked under the assumption that the proper figure is around 90% not 99.4%.

EXHIBIT C

As to your other requests for background data: There are currently approximately 189,000 service stations in the U.S. There are also approximately 10,000 gasoline jobbers in the U.S. These jobbers account for about 25% of the gasoline sold through service stations but supply more than their share of service stations because their gallonage is below the U.S. average which is approximately 54,000 gallons per station. It is very hard to determine how many lessee dealers are supplied by jobbers vs. major oil companies because of the large number of "Open Dealers" (dealers who own their own station) which are supplied by both. It is, however, fair to state that jobbers do supply somwhere somewhere around 40% of all of the lessee dealers who would be protected by this act. Of this number, however, many of the dealers lease stations from jobbers

which the jobbers in turn lease from major oil companies.

Jobbers have traditionally desired and continue to desire to operate through lessee dealers because it is far more compatible with the local small business type of marketing they do. This fact serves to show why it is unnecessary to include jobbers in the non renewal section, simply because they are much more interested in marketing through dealers then [sic] major oil companies.

The 22 million dollar figure also needs further explanation. While it at first seems rather large, one must realize that gasoline prices have nearly doubled in the past three years. Thus, 22 million dollars, sales in gasoline would break down to mean something in the neighborhood of 2.2 million dollars of gross profit or margin (at 4¢ per gallon). This "gross profit" figure is merely the difference of the distributor's

buying price and his selling price. It does not include all of the costs that he incurs which are very considerable i.e., transportation, rent, utilities, taxes, storage costs, employee costs, etc., etc.

It must be remembered also that this is an industry dominated by giants. It is this domination by giants that may make the duty to renew, an unprecedented legislative requirement, appropriate for this industry. But by the same token, if this is in fact the reason that such a duty is proper, the necessity to exclude all but these giant concerns from this duty is clear. Remember no one but the most radical has suggested that the fundamental property rights of anyone but the major oil companies be tampered with in such a manner. No one has suggested that damages must be paid when a property owner refuses to renew a lease, to let us a say [sic] a real estate office, at the end

of the agreed upon term. All that the Congressman's amendment would do is insure that small business petroleum marketers are not the first and only small businessmen to be improperly and unnecessarily singled out for this extraordinary duty.

See you at the markup tomorrow.

Sincerely,

Signed by: Bob

BB:SMC

STATEMENT IN SUPPORT OF AMENDMENT I

Mr. Chairman, my amendment could not be more simple-or more profound in its consequences. H.R. 13000-despite its attempt to adopt the guise of a pro small business measure-is, in many ways one of the most anti small business measures ever placed before a committee of this Congress.

H.R. 13000 brings to bear upon small business petroleum distributors weapons heretofore reserved for the likes of GM, Ford and Chrysler-and even there used only with the greatest infrequency.

It has been admitted by all observers that taken as whole, oil jobbers and their dealers have an unusually good relationship. Oil jobbers must face direct competition from their suppliers- the multi national multi-billion dollar integrated refiners. Yet, this bill, H.R. 13000 would place these

small businessmen, situated-as they are in the midst of the distribution process, with all the attendent grief and stress this implies, under the same strictures as the major oil companies.

This is ludicrous - it is unfair, it makes no sense and there is no precedent for it - NONE! Nowhere in our entire body of law is there a similar measure. - Never before has the Congress equated your home town small businessman with the General Motors and Exxon's of the world. And for good reasons, they are <u>not</u> the same.

My amendment is brief, simple and to the point. It defines and strengthens the proper and historic lines and interests among those affected by the bill. Further, it avoids conflict and contradiction between federal statutes.

My amendment says simply that if a firm is a small business for SBA purposes then it

is a small business under the pervue of this bill. To provide otherwise would mean making loans and small business set-asides under existing SBA programs to affirm than despite the exponential size difference treat Exxon and your small business constituent alike. We would help the little guy with one hand and then kill him off with the other.

Equity, logic, and the needs of the small business community demand fair treatment of all small businessmen within the petroleum industry. There has not been one single thread of evidence to even suggest the need for singling out oil jobbers for this unique manner of execution.

It is my hope that having considered all the provisions of this measure, designed as it is to void improper use of dominant market power, by giants, upon small businessmen you will not consent to the indefensible use of these same measures upon the

nation's small business petroleum distributors. To do so is to doom them to early extermination and deprive your constitutents of their vitally needed services.

If you were for protecting our small businessmen in an even handed and equitable manner, vote to support my amendment to include [sic] all small businessmen from the prohibitions of the bill.

National Oil Jobbers Council
1750 New York Avenue, N.W.
Washington, D.C. 20006
Tel: 202/331-1198

Tony,

Here is an updated version of the amendment. It reflects the page, line, and Section changes made in the new (Sept. 3) draft of 13000.

We are beginning to marshall support for the amendment but I hope the issue doesn't come up today so that we will have enough time to be really effective. Commerce will not meet again until next Monday at the earliest.

Thanks for your help. I will call you if I learn of any new developments.

Signed By: Bob

P.S. In addition to the "Golden words" in the attached statement you might wish to inform Mr. Carney that:

1. The amendment only removes qualifying distributors from the renewal obligations of the bill (the cancellation obligations remain) and

2. The FTC's Bureau of Competition testify that distributors should be excluded from all of the obligations of the bill.

Amendment to H.R. 13000
Offered by Mr. Carney

Page 25, line 19, amend Section 101 (3) by adding at end:

"Provided however, for the purposes of the renewal obligations in Section 102 the term "Franchisor" shall not include any distributor of motor fuels who's annual gross sales of such fuels (excluding taxes) are less than the maximum sales allowed for qualification for small business loans to "Petroleum Wholesalers" under the Small Business Administration's loan program, as the same is altered periodically by the Small Business Administration."

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CRIMINAL NO. 80-00502

UNITED STATES OF AMERICA

VS.

CHARLES J. CARNEY

DEFENDANT

APRIL 1, 1981

WASHINGTON, D.C.

The above-entitled matter came on for Motions before the Honorable William B. Bryant, United States District Court Chief Judge.

Appearances:

Andrew J. Reich
For the Government

James C. Herndon
Mark J. Skakun, III
Charles Work
For the Defendant

P R O C E E D I N G S

(THE DEFENDANT AND COUNSEL WERE PRESENT.)

THE DEPUTY CLERK: CRIMINAL NUMBER 80-502, THE CASE OF CHARLES J. CARNEY. COUNSEL, MR. REICH FOR THE GOVERNMENT, MR. HERNDON, MR. SKAKUN AND MR. WORK FOR THE DEFENDANT.

* * *

Mr. Reich: . . . The Court will note that in the grand jury, the government, because of the lack of judicial control over the grand jury -- well, not lack of judicial control, but because each item of evidence that is presented to the grand jury is not examined by the Court prior to the government introducing it before the grand jury, the government, out of an abundance of caution, leaned over backwards, in its opinion, and did not present certain items of evidence to the grand jury, even if there existed the most remote possibility that there could be a future argument that such evidence was covered by the Speech or Debate

Clause. Even though many of these items of evidence we do not feel are covered by the Speech or Debate Clause, out of an abundance of caution and in anticipation of a motion such as this one, we decided not to present such evidence to the grand jury. And I think the grand jury transcripts fully confirm the government's actions in this regard.

In addition to that, we advised witnesses both in and outside the grand jury of the parameters of the Speech or Debate Clause to insure that their testimony would not even remotely come within the Speech or Debate Clause.

* * *

MR. REICH: I would like to just comment on the three-page memorandum from Bob to Tony that attaches the document entitled "Amendment to H.R. 1300 [sic]" and underneath it it says, "Offered by Mr. Carney." Then there is an amendment under that.

THE COURT: Yes.

MR. REICH: We would agree that that document standing by itself, if the government attempted to introduce --

THE COURT: Wait a second.

MR. REICH: I believe it's part of a three-page -- it begins with a memo from Bob to Tony, and then there are two attached pages, the second of which is the amendment I'm referring to.

THE COURT: And you agree what?

MR. REICH: We agree that that document -- if the government attempted to introduce that particular document, standing by itself, that would clearly be covered by the Speech or Debate Clause, because it says, "Amendment to H.R. 13000" and right under it it says, "Offered by Mr. Carney."

If the government attempted to introduce that document standing alone, that would be included by the Speech or Debate Clause.

However, it's important for us to point out that the testimony that will accompany the introduction of this document, which will be the testimony of Robert Bassman, who is an attorney with the National Oil Jobbers Council -- he will testify that this particular document was prepared by him. And by prepared by him, he will testify that it was prepared and typed in the offices of the National Oil Jobbers Council prior to the time that the amendment was introduced by the Defendant. This would be a prelegislative period.

Now, with that qualification to the introduction of this amendment -- in other words, he will testify that, yes, I typed this in my office or had a secretary type it and that it was presented for consideration by the congressman to be introduced in the future.

He will not testify and we will specifically instruct him not to testify as to

whether or not the congressman did in fact offer this amendment. It will be very clear that although this document says "offered by Mr. Carney", he is not referring -- at the time that was typed in, the document had not yet been offered by Mr. Carney.

In fact, we're willing to excise that one sentence from that amendment if the court so desires, the sentence that says, "Offered by Mr. Carney."

THE COURT: Did in fact Mr. Carney offer it later?

MR. REICH: Did in fact he offer it?

THE COURT: Yes.

MR. REICH: Yes, he did. But we will not introduce any testimony with respect to his actually offering the amendment. We will only introduce evidence of acts to be performed in the future, not evidence of legislative acts that have already been performed.

Likewise, when Mr. Bassman testifies about the letter of September 13th that he wrote to Congressman Carney, with respect to that letter also where he discusses this amendment, that testimony will be in the context of actions that were taken prior to the time that any legislative act was taken by Mr. Carney.

And again, Mr. Bassman will be instructed not to make any references during his testimony as to whether or not the particular amendment was or was not introduced.

* * *

THE COURT: All right.

As to the specific items that you sought to have suppressed in this matter, I've indicated my ruling on them on an individual basis.

MR. SKAKUN: The one document, Your Honor, or two documents?

THE COURT: The two documents. I indicated how they would be handled.

I think the other motions are denied. The motion to dismiss is denied.

* * *

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 81-1200

George H. Benford,

Appellee,

versus

American Broadcasting
Companies, Inc.,
a New York Corporation,

Defendant,

and

Mrs. Issac (Betty) Hamburger,
Miss Kathleen T. Gardner,
Mrs. Lillian M. Teitelbaum,
and David L. Holton,

Appellants,

and

Margaret Osmer,

Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Argued May 6, 1981 Decided June 17, 1981

Before HAYNSWORTH, Senior Circuit Judge, HALL and MURNAGHAN, Circuit Judges.

Steven R. Ross, Assistant Counsel to the Clerk, U.S. House of Representatives (Stanley M. Brand, General Counsel to the Clerk, Michael L. Murray, Office of the Clerk on brief) for Appellants; Wilson K. Barnes and Dean E. Sharp for Appellee.

PER CURIAM:

Plaintiff, an independent agent of the American Family Life Insurance Company, filed an action against four staff members employed by the Select Committee on Aging of the United States House of Representatives (the "congressional defendants"), the American Broadcasting Company, and an ABC employee. The complaint alleged that, during a Committee investigation of abuses in the sale of insurance to the elderly, one congressional defendant infiltrated the plaintiff's business as a trainee and arranged a meeting at which the plaintiff presented his standard cancer insurance

promotion to two elderly women, also employees of the committee. Without the plaintiff's knowledge or consent, the meeting was videotaped by ABC and portions of that tape were subsequently broadcast on the ABC Nightly News. The plaintiff then filed an action for money damages, asserting that the defendants' conduct was unconstitutional, violative of state and federal statutes, and tortious. Although the Fourth Amendment claim was ultimately dismissed, the district court denied the congressional defendants' motion for dismissal or summary judgment based on the Speech or Debate Clause or, alternatively, the doctrine of absolute official immunity. Benford v. American Broadcasting Co., 502 F. Supp. 1148 (D.Md. 1980). The congressional defendants then filed an interlocutory appeal.

At the outset, we note that this court properly has jurisdiction of this appeal

under 28 U.S.C. § 1291. The denial of a dismissal motion based on the Speech or Debate Clause is an appealable final decision under the collateral order doctrine. Helstoski v. Meanor, 442 U.S. 500 (1979). We may review the rejection of the alternative basis for dismissal as an incidental exercise of this court's power over the Speech or Debate question. See also Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1986 (5th Cir. 1973).

We affirm, for reasons adequately stated in the opinion of the district court. [1] Liability may not be predicated on "legislative acts" performed by the congressional defendants. They may be held accountable in a private civil action for

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[1] Like the district court, we intimate no view as to whether the plaintiff has stated a valid claim, or whether the defendants might successfully assert other defenses.

acts not legislative in nature that are unconstitutional, illegal, or tortious. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). The Supreme Court's decisions leave no doubt that, as a matter of law, the public broadcast of the taped meeting was not an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constituion places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Nor, at this point in the proceedings, does the record establish with sufficient strength to justify summary disposition that the congressional defendants' involvement in the taping of the meeting by ABC was a legislative act. Our ruling does not foreclose a contrary decision on a motion for

summary judgment or at trial if the congressional defendants factually demonstrate that their involvement in the taping was protected legislative activity.

Similarly, our decision on the Speech or Debate question forecloses dismissal at this early stage under the common-law doctrine of absolute immunity announced in Barr v. Matteo, 360 U.S. 564 (1959). See Doe v. McMillan, 412 U.S. 306, 318-24 (1973).

Because the question is not properly presented by a cross-appeal, we express no view as to the correctness of the district court's ruling that the congressional defendants may be entitled to qualified immunity under Butz v. Economou, 438 U.S. 478 (1978).

AFFIRMED.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-371

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES J. CARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL T. GOLDING
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

Whether the Speech or Debate Clause requires the dismissal of petitioner's indictment even though the indictment makes no reference to legislative acts and the district court implicitly found, after examining the grand jury transcript, that little if any privileged evidence had been presented.

2. Whether the district court's denial of petitioner's motions for inspection of the grand jury transcript and the suppression of certain documents on Speech or Debate Clause grounds are "final decisions" appealable under 28 U.S.C. 1291.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-371

CHARLES J. CARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A5) is not yet reported.[1] The rulings of the district court (A. 267-268, 274, 301-302)[2] are unreported.

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[1] The court of appeals ordered the publication of the judgment order on September 3, 1981.

[2] "A." refers to the joint appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1981, and the petition for a writ of certiorari was filed on August 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former member of the House of Representatives, was indicted in 1980 in the United States District Court for the District of Columbia for soliciting and receiving an illegal gratuity, in violation of 18 U.S.C. 201(g) (Pet. App. A6-A7). The indictment charged that during petitioner's eight years in Congress the Lyden Oil Company paid for his purchases on gasoline credit cards and that it did so "for and because of official acts performed and to be performed by [petitioner]" (*ibid.*). Before trial, petitioner filed three motions that form the basis for his petition. He first moved (A. 2-10) for permission to inspect the grand jury minutes in order to verify his belief that the grand jury had considered materials protected by the Speech or Debate Clause (U.S. Const. art. I, § 6, cl. 1).[3] He then moved (A. 120-175) to dismiss the indictment, claiming that the grand jury had received evidence privileged under that clause.[4] Finally, he moved (*id.* at

[3] Petitioner's motion to inspect the grand jury transcript was supported solely (A. 3) by his own affidavit (*id.* at 7-8) stating that his aides, who had knowledge of his legislative acts and motivations, had testified before the grand jury and that agents of the Federal Bureau of Investigation had examined his office files and had removed and copied some unidentified documents.

[4] In support of his claim that privileged materials had been considered by the grand jury, petitioner cited (A. 122) the following. First, he relied upon the affidavit of a lobbyist (*id.* at 141) stating that he testified before the grand jury,

216-220) to suppress ten documents on Speech or Debate Clause grounds.[5]

After examining the grand jury transcript in camera, the district court denied petitioner's motion to dismiss the indictment and refused to permit inspection of the grand jury minutes (A. 302). The

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that he had supplied petitioner's staff with factual information relevant to proposed legislation and had "cooperated" with a member of the staff "in the preparation" of proposed legislation. Second, petitioner relied upon grand jury subpoenas (*id.* at 137-140) issued to other persons and calling for the production of, among other things, documents relating to the "Petroleum Marketing Practices Act." Finally, he relied (*id.* at 121-122) upon documents listed in the bill of particulars as evidence of official acts performed by petitioner in violation of 18 U.S.C. 201(g) and upon statements made by the prosecutor during argument on petitioner's motion for inspection of the grand jury minutes.

[5] Five of the documents were letters to petitioner from W.G. Lyden, Jr., the president of the Lyden Oil Company, expressing Lyden's views on various energy matters (see A. 163-165, 167, 168, 170-171).

Two were letters to a member of petitioner's staff from a lobbyist for the National Oil Jobbers Council (A. 225-226, 229-230). One of these simply supplied "background data" (*id.* at 225), principally about gasoline jobbers (*id.* at 225-226), while the other was a cover letter (*id.* at 229) attached to a proposed amendment drafted by the lobbyist (*id.* at 230). See *id.* at 277.

Three of the documents were letters from petitioner to Lyden (A. 200, 202, 204). In one, petitioner thanked Lyden for his views on a pending bill and stated that he was still studying the matter (*id.* at 204). In another, petitioner stated that he intended to vote against an increase in the gasoline tax (*id.* at 200). The government also agreed to the deletion (*id.* at 273-274) of the second paragraph of the final letter (*id.* at 202). The remainder of that letter merely thanked Lyden for his letter expressing support for amendments to the Clean Air Act proposed by another Congressman (*ibid.*).

court also ordered the suppression of one of the documents challenged by petitioner and a portion of another, but the court refused to suppress the rest (*id.* at 267-268, 274, 301-302).

In a judgment order (Pet. App. A1-A5), the court of appeals affirmed the denial of petitioner's motion to dismiss the indictment (*id.* at A3-A5). The court held that the other rulings challenged by petitioner—those denying his motions for inspection of the grand jury minutes and the suppression of certain documents—were not "final decisions" within the meaning of 28 U.S.C. 1291 and that appellate jurisdiction was therefore lacking (Pet. App. A2-A4).

ARGUMENT

The courts below correctly held that dismissal of petitioner's indictment was not required by the Speech or Debate Clause. Petitioner and amicus maintain (Pet. 10-12; Am. Br. 3-6) that the decision in this case conflicts with *United States* v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980), and *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980). In fact, however, no conflict exists.

In *Myers*, the Second Circuit rejected a claim that dismissal of the indictment was required because the grand jury had heard "some evidence" privileged under the Speech or Debate Clause. 635 F.2d at 941. Noting that an indictment is not normally subject to dismissal on the ground that the grand jury considered incompetent evidence, the court added that because of the nature of the evidence presented to the grand jury in that case, it was unnecessary to decide whether dismissal would be required "in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether

the grand jury had sufficient competent evidence to establish probable cause" (*id.* at 941 n.10).[6]

In *Helstoski*, the Third Circuit dismissed counts of an indictment because "the trial judge made a factual finding based upon his review of the transcripts that improper introduction of privileged matter permeated the whole proceeding." 635 F.2d at 205. The court said that there had been a "wholesale violation" of the privilege and that "the infection cannot be excised" (*ibid.*).[7]

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[6] The Second Circuit reached a similar result in *United States* v. *Williams*, 644 F.2d 950 (2d Cir. 1981), noting that the district court had found that the privileged evidence "constituted an insignificant portion of the evidence presented to the [grand] jury and was not a factor in the issuance of the indictment." *Id.* at 952. Quoting *Myers*, the court of appeals added that "the introduction of the tainted testimony raised no 'substantial question of whether the grand jury had sufficient competent evidence to establish probable cause.'" *Ibid.*, quoting 635 F.2d at 941 n.10.

[7] The refusal to dismiss the instant indictment is supported by *United States* v. *Johnson*, 383 U.S. 169 (1966), and *United States* v. *Johnson*, 419 F.2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970). Former Congressman Johnson was initially convicted of conspiracy and several substantive offenses, but this Court held that his conspiracy conviction could not stand because it was based in part upon evidence protected by the Speech or Debate Clause, *i.e.*, a speech given in Congress. 383 U.S. at 173-185. This Court held, however, that Johnson could be retried on that count after all references to the speech were deleted from the indictment. *Id.* at 185. Thus, as recently pointed out in *Myers*, since the grand jury heard evidence concerning Johnson's speech and alleged it as part of the conspiracy, it was this Court's "implicit conclusion" that the grand jury's consideration of privileged evidence did not taint the indictment subsequently returned. 635 F.2d at 941.

After Johnson was retried and convicted on a number of counts, the court of appeals rejected his argument that those

In the present case, the district court examined the grand jury transcripts and found that dismissal of the indictment was not required under *Myers* or *Helstoski* (A. 302). Thus, the court implicitly found no violation of the Speech or Debate Clause comparable to that in *Helstoski* or the hypothetical case upon which the *Myers* court reserved decision.[8]

The claim of conflict advanced by petitioner and amicus is based on dictum in the brief passage in the judgment order of the court of appeals devoted to this issue (Pet. App. A3-A4). After holding that dismissal of the indictment would not be required "[e]ven if it is true, as appellant claims, that *some of the evidence* presented to the grand jury violated

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counts were invalid "because the grand jury that returned them heard evidence concerning his Congressional speech." 419 F.2d at 58.

[8] The government represented to the court that it had refrained from presenting to the grand jury any arguably privileged evidence and had cautioned its witnesses so that they would not give any testimony concerning matters protected by the Speech or Debate Clause (Pet. App. A41-A42). The accuracy of the government's representation is illustrated by the fact that most of the documents that petitioner moved to suppress at trial were not presented to the grand jury (A. 184, 186-188); the government refrained from using them against petitioner until the question of privilege could be tested in adversary proceedings. In fact, petitioner's claim that constitutionally protected materials were presented to the grand jury rests upon sheer supposition. The facts adduced in support of his motion (see pages 2-3, note 4, *supra*) suggest nothing more than that the grand jury may have considered evidence relating to correspondence with constituents and lobbyists and evidence concerning work done by his staff in preparing proposed legislation. Petitioner has failed to come forward with facts showing that any of this evidence was protected by the Speech or Debate Clause, let alone that there was the kind of massive presentation of protected materials found to have infected the indictment in *Helstoski*.

the Speech or Debate Clause" (*id.* at A3) (emphasis added), the court observed that "only those parts of an indictment which are facially invalid should be dismissed on Speech or Debate Clause grounds" (*id.* at A4). Because of the brevity of the court's treatment of this issue, the precise meaning of this dictum is unclear. But even if the court's language indicates that it would have reached a different result from *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980), there is nevertheless no conflict between the result in *Helstoski* and the decision below, since in the present case there has been no showing of any basis for concluding that Speech or Debate Clause materials were presented to the grand jury at all, let alone that, as in *Helstoski*, they pervasively permeated that body's inquiry. See page 6, note 8, *supra*. In other words, whatever the District of Columbia Circuit might have done in *Helstoski*,[9] there is no basis for supposing that the Third Circuit would have decided the instant case differently—which is essential to the establishment of a conflict in this case. Further review by this Court is accordingly unwarranted.

2. The court of appeals was also correct in dismissing petitioner's appeal from the denial of his motion for inspection of the grand jury minutes and

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[9] Amicus has reproduced as an appendix to its brief a letter written by Assistant Attorney General Jensen to the clerk of the court of appeals requesting publication of the opinion, in part on the ground that it creates a "split of opinion" (Am. Br. App. 3A) in the circuits by differing with *Helstoski*. As we read the letter, the "split" relates to the correctness of the outcome in *Helstoski*, called into question here, not to any likely difference in the disposition of the instant case.

suppression of certain documentary evidence.[10] It is settled that orders denying such motions cannot normally be appealed. *DiBella* v. *United States*, 369

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[10] Moreover, it is apparent that the district court was correct in denying both those motions. Inspection of grand jury minutes should not be ordered unless a "particularized need" for that relief is shown. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); *United States* v. *Williams*, 644 F.2d 950, 952 (2d Cir. 1981). Here, petitioner's affidavit (see page 2, note 3, *supra*) fell far short of the required showing. First, the affidavit failed to show that privileged evidence was presented to the grand jury; it merely indicated that persons with knowledge of privileged matters had testified and that arguably privileged documents might have been taken or copied by government agents. Second, the district court's in camera examination of the transcript obviated in large measure petitioner's asserted need to inspect the transcript himself.

It is equally clear that none of the documents challenged by petitioner (see page 3, note 5, *supra*) is protected by the Speech or Debate Clause. That clause bars the introduction of evidence of a Congressman's legislative acts or the motivation for legislative acts. *United States* v. *Helstoski*, 442 U.S. 477, 487-488 (1979). "'A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it.'" *Id.* at 488, quoting *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). The Speech or Debate Clause certainly does not protect letters from constituents, lobbyists, or others expressing views, supplying background information, or offering suggested amendments relating to matters before Congress. Nor does it shield a Congressman's routine responses to such correspondence, provided that no reference is made to his past legislative acts. Cf. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 (1979) (newsletters and press releases not privileged); *United States* v. *Brewster*, *supra*, 408 U.S. at 512-513 (services for constituents not privileged). And "it does not privilege either [a member of Congress] or [an] aide to violate an otherwise valid law in preparing for or implementing legislative acts." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972).

U.S. 121 (1962) (motion to suppress); *In re Special March 1974 Grand Jury*, 541 F.2d 166 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977) (motion to inspect). Petitioner and amicus maintain (Pet. 5-10; Am. Br. 7-13) that an interlocutory appeal should nevertheless be permitted when, as in this case, those motions are based on Speech or Debate Clause grounds. Their argument, however, plainly fails.

The denial of a motion to dismiss an indictment on Speech or Debate Clause grounds is a final order appealable under 28 U.S.C. 1291 because it satisfies the three requirements of the collateral order exception to the final-order rule first announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979). First, it constitutes " 'a complete, formal and, in the trial court, final rejection' " (*Helstoski* v. *Meanor*, *supra*, 442 U.S. at 506, quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977)) of the defendant's claim that his trial is barred by the Speech or Debate Clause. By contrast, evidentiary rulings and orders regarding discovery must frequently be reevaluated as events at trial unfold.

Second, an order denying a motion to dismiss the indictment on Speech or Debate Clause grounds concerns a claim " 'collateral to, and separable from' " (*Helstoski* v. *Meanor*, *supra*, 442 U.S. at 507, quoting *Abney* v. *United States*, *supra*, 431 U.S. at 659) the trial itself. Evidentiary rulings and discovery orders, on the other hand, are not so discrete. Motions to suppress seek to prevent the introduction of " 'evidence which the Government plans to use in obtaining a conviction.' " *Helstoski* v. *Meanor*, *supra*, 442 U.S. at 507, quoting *Abney* v. *United States*, *supra*, 431 U.S. at 659. Requests for discovery seek evidence to

be used at trial or in ancilliary proceedings. The impact of the trial court's rulings on such matters can frequently be assessed only after the trial and all related proceedings have concluded.

Finally, an order denying a motion to dismiss the indictment on Speech or Debate Clause grounds concerns a right that "would be 'lost, probably irreparably,' if review had to await final judgment" (*Abney* v. *United States*, *supra*, 431 U.S. at 658, quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546)—*i.e.*, the right enjoyed by a member of Congress not to be tried by any other body for his legislative acts. The same right is not at stake, however, when the district court refuses to suppress evidence or to permit inspection of grand jury minutes. Even if the evidence were suppressed or inspection allowed, in most instances the trial would take place anyway.

Petitioner and amicus contend (Pet. 6; Am. Br. 6-7) that the decision below dismissing the appeal from the denial of petitioner's motion for inspection of the grand jury transcript conflicts with *United States* v. *Williams*, 644 F.2d 950 (2d Cir. 1981), a pretrial appeal in which the court reached the merits of a similar issue. In that case, however, the court did not discuss its jurisdiction to entertain the defendant's claim, and the issue apparently was not raised by the parties.[11]

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[11] Contrary to petitioner's suggestion (Pet. 6-7, 9), *United States* v. *Helstoski*, *supra*, *United States* v. *Myers*, *supra*, and *United States* v. *Williams*, *supra*, provide no support for the argument that an order refusing to suppress evidence under the Speech or Debate Clause is a "final decision" appealable under 28 U.S.C. 1291. In *Helstoski*, the government appealed under 18 U.S.C. 3731, a special provision authorizing the government to appeal orders suppressing or excluding evi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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Assistant Attorney General

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Attorney

NOVEMBER 1981

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dence. *Myers* suggested that a Congressman should have a preferred right to pretrial review of only those claims that can be "readily resolved before trial and would, if upheld, *prevent* trial or conviction on a pending indictment." 635 F.2d at 936 (emphasis added). *Williams* further emphasized that the preferred right of review applies only in the case of issues that are "readily resolvable in advance of trial." 644 F.2d at 952. As we have shown, successful appeal of a ruling refusing to exclude evidence will not necessarily prevent trial or conviction, and questions concerning the admissibility of evidence must frequently be reevaluated as the trial progresses.

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Amicus Brief

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No. 81-371

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES J. CARNEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BRIEF OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER, THE HONORABLE JIM WRIGHT, MAJORITY LEADER, AND THE HONORABLE ROBERT H. MICHEL, REPUBLICAN LEADER, UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the general rule that a court will not look behind a facially valid indictment precludes consideration of a Member of Congress's motion seeking, based on Speech or Debate Clause, dismissal of an indictment which was returned by a grand jury which had been presented with evidence of the Member's legislative actions.

2. Whether the district court's pre-trial denial of a motion for access to grand jury minutes, based on the Member's Speech or Debate Clause rights, is directly appealable, where the Member has made a showing that Speech or Debate material had been presented to the grand jury.

3. Whether a Member of Congress who is being brought to trial on a criminal charge which relates to his official duties can obtain appellate review of a district court's denial of the Member's motion to suppress or exclude the use of evidence of the Member's legislative actions at trial.

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The Speaker of the United States House of Representatives, pursuant to the authority vested in him by the Constitution and the rules of the House, accompanied by the Majority and Republican Leaders, hereby appear as *amici curiae,* with the consent of the parties.[1]

INTEREST OF THE AMICI CURIAE

In 1979 this Court granted the motion of the Speaker of the United States House of Representatives and permitted his participation, through counsel, as *amicus curiae* in both the briefing and argument in *United States* v. *Helstoski*, 442 U.S. 477 (1979) and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979). At that time the Speaker, joined by two members of the United States House of Representatives, sought participation in a case which they described as "involv[ing] issues of paramount importance to the Legislative Branch of government and the due functioning of the legislative process," and "[b]ecause of the importance of the [Speech or Debate] Clause to the legislative branch as a separate and distinct institution of government. . . ."

The present matter, a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, seeking Supreme Court review of

[1] The letters of consent from the Solicitor General and petitioner have been filed with the Clerk.

certain substantive and procedural holdings relating to the Speech or Debate Clause, raises many of the same or closely related concerns. For these reasons the Speaker, the Honorable Thomas P. O'Neill, Jr., joined by the bi-partisan elected leadership, the Honorable Jim Wright, Majority Leader and the Honorable Robert H. Michel, Republican Leader, United States House of Representatives, urge this Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Department of Justice, in a recent communication to the United States Court of Appeals for the District of Columbia Circuit concerning that court's decision in this case stated:

> The Department of Justice believes that the court's opinion is significant in that it holds that, although a defendant may challenge the facial validity of an indictment on the grounds of the Speech or Debate Clause, he may not challenge the indictment on the grounds that evidence presented to the grand jury violated the Clause. The opinion is consistent with that of the Second and Fourth Circuit Courts of Appeals, but is contrary to the decision of the Third Circuit Court of Appeals in *United States* v. *Helstoski*, 635 F. 2d 200 (3d Cir. 1980)
>
> We believe this opinion adds significantly to the wealth of knowledge on an issue in which there has been sparse judicial, statutory or constitutional guidance . . . .
>
> Furthermore, the Department of Justice anticipates that it will rely upon this decision in future cases.

> Letter from D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Department of Justice to Mr. George A. Fisher, Clerk, United States Court of Appeals for the District of Columbia Circuit, July 30, 1981. App. p. 2A. *infra* (citations omitted)

The Department of Justice, the prevailing party in the court of appeals, has in that letter aptly stated the basis for granting the petition for certiorari. Not only does the decision below involve the factors set forth for this court's discretionary exercise of its jurisdiction under Rule 17 of the Supreme Court Rules, but the further factors involved in a conflict between two branches of government over the interpretation and application of a constitutional provision designed to give force and effect to the fundamental principles of separation of powers provide special and important reasons which argue for this Court's consideration.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS DECISION IS DIRECTLY IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS ON THE SAME MATTER

The United States Court of Appeals for the District of Columbia Circuit held, in this case, that even if "some of the evidence presented to the grand jury violated the Speech or Debate Clause, dismissal of the grand jury indictment was not appropriate. Rather we think that only those parts of an indictment which are facially invalid should be dismissed on Speech or Debate Clause grounds." *United States*

v. *Carney*, No. 81-1738 (D.C. Cir. June 29, 1981) (Pet. App. p. A3-4. (citations omitted).

This refusal to look behind the face of an indictment directly conflicts with the recent holding of the Third Circuit on the same question. *United States* v. *Helstoski*, 635 F.2d 200 (3rd Cir. 1981). That Circuit upheld a district court's dismissal of an indictment, despite its facial validity, where a review of the grand jury record revealed substantial presentation of Speech or Debate material to the grand jurors. *Id.* at 203-205.

This conflict illuminates more than just a differing fact pattern leading to inconsistent results; rather, the differing results in the two circuits reveal a total and irreconcilable disagreement between two federal courts of appeals on a basic question of federal constitutional law.[2]

Both circuits reviewed essentially the same line of cases, *United States* v. *Johnson*, 383 U.S. 169 (1966); *United States* v. *Johnson*, 419 F.2d 56 (4th Cir. 1969) *cert. denied*, 397 U.S. 1010 (1970) (*Johnson* II, a pre-*Helstoski*, pre-*Gravel* and pre-*Brewster* decision declining to look behind the face of an indictment); *United States* v. *Calandra*, 414 U.S. 338 (1974); and *Costello* v. *United States*, 350 U.S. 359 (1956). These cases purport to foreclose dismissal of an indictment because of the nature of the evidence introduced to the grand jury. The Third Circuit reasoned that this

[2] The District of Columbia Circuit acknowledged the conflict by citing the earlier Third Circuit opinion and signaling it as contrary.

court's recent pronouncements on the application of the Speech or Debate Clause in a criminal proceeding against a Member of Congress, *United States* v. *Helstoski,* 422 U.S. 477 (1979) and *Helstoski* v. *Meanor,* 422 U.S. 500 (1979), as well as the significant differences between Speech or Debate protections and the rights at issue "in other cases seeking to quash indictments, *E.g. United States* v. *Calandra, supra*" *United States* v. *Helstoski,* 635 F.2d at 204, provide ample judicial footing for proclaiming an exception to the general rule that courts will not look behind the facial validity of an indictment.

The District of Columbia Circuit, on the other hand, has held that while *Helstoski* v. *Meanor, supra,* provided a direct, pre-trial appeal of a motion to dismiss an indictment "only those parts of an indictment which are facially invalid should be dismissed . . . ." *United States* v. *Carney, supra* (Pet. App. p. A4).

One other circuit, the Second, has in light of *Helstoski, Gravel* and *Brewster* addressed this question. In *United States* v. *Myers,* 635 F. 2d 932, (2nd Cir. 1980) *cert. denied,* 101 S. Ct. 364 (1980) that Circuit noted that because of the nature of the extensive videotaped and recorded evidence that had been presented to the grand jury it was clear that no significant amount of "Speech or Debate" evidence was put before the grand jury. *Id.* at 941 n. 10. Therefore, the Second Circuit concluded, it need not consider questions posed by an indictment which was reported by a grand jury which heard a large proportion of Speech or Debate evidence. More recently in

United States v. *Williams*, 644 F. 2d 950, 952 (2d Cir. 1980) the Second Circuit noted that the "insignificant amount of tainted testimony" would neither justify pretrial dismissal of an indictment nor provide the required "particularized need" for disclosure of the complete grand jury transcripts.

The inconsistent results reached by the courts of appeals in the Third Circuit and the District of Columbia Circuit disclose a disagreement on a very basic principle—whether a court will look behind the facial validity of an indictment of a Member of Congress to determine if the presentation of the Member's legislative actions, clearly a prohibited questioning under the Speech or Debate Clause, see *Gravel* v. *United States*, 408 U.S. 606, requires dismissal of the indictment or whether a court, despite any number of Speech or Debate improprieties which occurred during the grand jury proceedings, is estopped from voiding a facially valid indictment. In light of the "sensitivity" which this Court has recognized should be afforded the important constitutional principles given effect by the Clause, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case and settle the question.

A second conflict among the circuits which appears by virtue of the opinion of the Court of Appeals for the District of Columbia Circuit is the appealability of a denial of a Congressional defendant's motion to permit inspection of the grand jury minutes. The decision below flatly holds that "the District Court's ruling . . . is unappealable at this juncture." *United*

States v. *Carney*, (Pet. App. p. A2). To the contrary is the treatment afforded Senator Williams by the Second Circuit. In *United States* v. *Williams*, 644 F. 2d 950, 952 (1981) that Circuit specifically provided appellate review of a district courts' pre-trial denial of a motion for access to grand jury minutes. In *Williams* the Second Circuit held that while the district courts ruling on grand jury access was reviewable, it should be affirmed. The Court of Appeals stated that neither Senator Williams' status as a Member of Congress, nor the insignificant amount of tainted testimony that was presented to the grand jury required disclosure of the entire grand jury record. 644 F.2d at 952.

Clearly there exists a conflict between the two circuits on the important question of the appealability of a trial courts' pre-trial denial of a motion seeking access to grand jury minutes.

B. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The first two questions presented in Amici's formulation represent important questions of federal constitutional law which have not yet been, but should be, squarely, addressed by this Court.

In *Helstoski* v. *Meanor, supra*, this Court held that the denial of a pre-trial motion to dismiss an indict-

ment based on the application of the Speech or Debate Clause was directly appealable. 442 U.S. at 506–508. This was an exception, though not a unique one, to the rule barring interlocutory or piece-meal appeals, particularly in the criminal area. *Calandra, supra* and *Costello, supra,* but see *Abney* v. *United States,* 431 U.S. 651 (1977).

Two concerns—protecting the historic independent investigatory role of the grand jury and the necessity for timeliness in the administration of the criminal justice system—have resulted in judicial reluctance to look behind a facially valid indictment to determine whether constitutional violations which may have occurred at the grand jury stage should result in dismissal of an indictment. Some, including *Amici,* have read the logic of Court's opinion in *Helstoski* and *Meanor* as a vindication of the proposition that the important constitutional safeguards incorporated in the Speech or Debate Clause require judicial treatment sensitive enough to justify an occasional departure from the general rules regarding judicial review of grand jury consideration. See, e.g., *United States* v. *Helstoski,* 442 U.S. at 491 (purpose of Clause is "to preserve constitutional structure of separate, coequal and independent branches of government"). Others, most notably the District of Columbia Circuit and the Executive Branch, have read this Court's pronouncements in *Meanor* to require pre-trial appellate review *only* of the actual language of an indictment of a Member of Congress. To the extent that the decision in *Helstoski* and *Meanor* leave unanswered this question the Court should now resolve it.

A second question presented by the court of appeals decision awaiting resolution by this Court is the appealability of an order denying access to the minutes of grand jury proceedings.

The applicability of the Speech or Debate Clause's prohibition of any extra-legislative questioning of legislative acts to the proceedings of a grand jury is apparent. Not only does the Clause literally proscribe questioning "in any other place" but it is firmly established that the Clause may be invoked in regard to grand jury proceedings. *Gravel* v. *United States,* 408 U.S. 606 (1972) *In Re Grand Jury Investigation* (*Eilberg*), 587 F. 2d 589 (3rd Cir. 1978).

The Court has spoken with clarity as to both the applicability of the protections afforded by the Clause to a grand jury proceeding (*Gravel*) and the necessity for allowing direct pre-trial appeals of denial of a Member's motion to dismiss an indictment which, based on the Clause, contests *"the very authority of the* [*executive*] *to hale him into court to face trial on the charge against him." Helstoski* v. *Meanor, supra,* at 507 *quoting Abney* v. *United States,* 431 U.S. 651 (1977) (emphasis in original).

There remain, however, questions with regard to what procedural and substantive safeguards are available to Members of Congress to assure the viability of the Clause's protection. As discussed above one such question involves whether a facially valid indictment can withstand a pre-trial challenge alleging Speech or Debate violations in the grand jury.

If the indictment of a legislator is going to be subjected to meaningful scrutiny in an effort to limit the

grand jury's inquiry of a Member of Congress's conduct to constitutionally permissible non-legislative areas the question of access to grand jury minutes naturally arises. The conflicting appellate treatment of motions for access by legislators demonstrates that the federal appellate bench, at least, views this as a question left still unanswered by this Court. It bears repeating that the practical and constitutional impact of any prosecution of a Member of Congress by the Executive Branch requires, as this Court has consistently recognized, sensitive treatment by the judiciary. Part of this sensitive treatment should be the provision of clear and consistent procedural rules for all aspects of such prosecutions. This court should determine whether a Member of Congress who has been indicted by a grand jury which admittedly considered a certain amount of evidence which fairly falls within the Speech or Debate Clause can obtain appellate review of a district court's denial of a motion for access to grand jury minutes.

C. THE EVIDENTIARY RULINGS DECIDE A FEDERAL QUESTION OF LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals below ruled that "appellant's pretrial motion to exclude from use at trial certain evidence purportedly covered by the Speech or Debate Clause is not a 'final decision' for purposes of 28 U.S.C. § 1291 (1976) and it is therefore unappealable." (Pet. App. p. A2).

The court's ruling on this point eviscerates the very essence of the Court's evidentiary holdings in *Helstoski, inter alia*, that "[r]evealing information as to a legislative act . . . to a jury would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause" *Helstoski, supra* at 490. The court of appeals' refusal to entertain the evidentiary rulings conflicts with other holdings as well, which relieve the Member of "the burden of defending" himself for legislative acts, *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967) or which do not permit the prosecution, upon introduction of legislative acts or the motives therefor, to shift the burden to the Member to "explain them away" to the satisfaction of a jury. *United States* v. *Johnson*, 383 U.S. 169, 177, 184 (1966).

As this case now stands based on the lower courts ruling on appealability of the district's court's evidentiary rulings Congressman Carney faces the prospect that he will be forced to defend legislative acts at trial if the prosecution determines to introduce them.[3]

The specific procedural posture in which the Court decided *Helstoski* is identical to the posture of this case. In *Helstoski*, the prosecution sought pre-trial ruling

[3] The prosecution argued below that because it had not yet determined the precise context in which the legislative materials would be introduced this factor supported the lack of "finality" of the evidentiary rulings. Brief For Appellee at 43. Of course, the prosecution in *Helstoski* could not supply the contexts in which the legislative acts would be used, but this did not affect the reviewability of the district court's evidentiary rulings.

from the District Judge on the admissibility of 23 categories of evidence it intended to introduce at Congressman Helstoski's trial in order to avoid the possibility of a mistrial. *United States* v. *Helstoski,* 442 U.S. at 484. The District Judge declined to pass on each category of proof and instead entered an order prohibiting the prosecution from introducing evidence concerning the Congressman's legislative acts. The prosecution regarded this order as a suppression and appealed pursuant to 28 U.S.C. § 3731. *Id.* at 485.

Here, Congressman Carney sought similar pre-trial rulings on the admissibility of his legislative acts at trial, which were denied in part by the District Judge. To conclude, as the court of appeals did, that these evidentiary rulings are not "final" as to Congressman Carney in the face of assertions that the prosecution intends to use them, but to allow the prosecution to appeal precisely the same kinds of evidentiary rulings pursuant to 28 U.S.C. § 3731 stands *Helstoski* and the important values which the Clause protects on their heads and is totally inconsistent with the intent of the Clause which "was designed *to preclude* prosecution of Members for legislative acts." *United States* v. *Helstoski,* 442 U.S. at 488. (emphasis added) Even in the absence of a statute specifically authorizing appeal of suppression orders relating to Speech or Debate evidence, this Court's pronouncements make it clear that a Member's Speech or Debate rights can only be properly safeguarded through thorough pre-trial appellate review of his claims.

What makes it imperative to review the court of appeals ruling on this point is the Department's intention to "rely upon" the court of appeals holding in the future in the very Circuit where Congress sits and conducts most of its legislative business.

Conclusion

The Speech or Debate Clause is a fundamental part of our structure of government and entitled to more "sensitivity" than that accorded by the meager court of appeals rulings. For this and all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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September 23, 1981

APPENDIX A

OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
CRIMINAL DIVISION,
Washington, D.C., July 30, 1981.

Mr. GEORGE A. FISHER,
Clerk, United States Court of Appeals for the District of Columbia Circuit, Washington, D.C.

DEAR MR. FISHER: On June 29, 1981 this Court ruled in favor of the government in an interlocutory appeal in the case of *United States* v. *Charles J. Carney*, No. 81–1378. The panel in that case was comprised of the Honorable J. Skelly Wright, the Honorable Carl McGowan and the Honorable Malcolm R. Wilkey.

The purpose of this letter is to request that the opinion in that case be published. To briefly summarize the facts of the case, Carney served as a United States Congressman from November 1970 until January 1979. In the later part of 1980 he was indicted for a one-count violation of the gratuity statute, 18 U.S.C. § 201(g), relative to his conduct in using gasoline credit cards that were given to him and paid for by William G. Lyden, Jr., the owner of an oil company located in Carney's congressional district.

In pretrial rulings the District Court (1) held that no violation of the Defendant's privilege under the Speech or Debate Clause of the United States Constitution occurred in the proceedings before the grand

jury which would justify dismissal of the indictment, (2) denied Carney's motion to suppress ten documents on the grounds that they contained privileged Speech or Debate material, and (3) denied Carney access to the minutes of the grand jury that indicted him. An interlocutory appeal was taken, and this Court affirmed the District Court's ruling on issue (1) above, and dismissed issues (2) and (3) on the grounds that they were not subject to an interlocutory appeal.

The Department of Justice believes that the Court's opinion is significant in that it holds that, although a defendant may challenge the facial validity of an indictment on the grounds of the Speech on Debate Clause, he may not challenge the indictment on the grounds that evidence presented to the grand jury violated the Clause. The opinion is consistent with that of the Second and Fourth Circuit Courts of Appeals (*United States* v. *Myers,* 635 F. 2d 932 (2d Cir.), *cert. denied,* 101 S. Ct. 364 (1980); *United States* v. *Johnson,* 419 F.2d 56 (4th Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970)), but is contrary to the decision of the Third Circuit Court of Appeals in *United States* v. *Helstoski,* 635 F.2d 200 (3d Cir. 1980).

We believe this opinion adds significantly to the wealth of knowledge on an issue in which there has been sparse judicial, statutory or constitutional guidance. Because of the important precedential value of the opinion, we strongly urge this Court to publish

its decision. Through publication the opinion will be made available to both the defense and prosecution bars, and to other courts which will inevitably be asked to rule upon this issue in future cases. This is especially important in view of the split of opinion in the Circuits on the issue in question, and in order to establish a record for the possibility that this issue may eventually be considered by the Supreme Court. Furthermore, the Department of Justice anticipates that it will rely upon this decision in future cases.

Please bring this letter to the attention of the Judges who participated in this case. Your consideration of this matter is greatly appreciated.

Sincerely,

D. LOWELL JENSEN,
Assistant Attorney General,
Criminal Division.

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